NO. 3680

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

WONG WONG,

Plaintiff, Plaintiff-in-Error,

vs.

HONOLULU SKATING RINK, LTD., MORRIS ROSENBLEDT and FRED HARRISON,

Defendants, Defendants-in-Error.

In Error to the Supreme Court of Hawaii

BRIEF FOR DEFENDANTS-IN-ERROR, MORRIS ROSENBLEDT AND FRED HARRISON

A. G. SMITH and R. J. O'BRIEN,
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Filed this.....day of.....
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F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

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PRELIMINARY STATEMENT.

This is a writ of error to the Supreme Court of the Territory of Hawaii, to review a judgment of that court in favor of the defendants-in-error, Rosenbledt and Harrison, in an action brought by Wong Wong, the plaintiff-in-error, to enforce a mechanics' lien.

STATEMENT OF FACTS.

On the 11th day of December, 1914, the plaintiff-in-error filed a notice of lien against the property of the defendants-in-error. Thereafter on the 16th day of December, 1914, the plaintiff-in-error insti-

tuted an action in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii to enforce said notice of lien.

The complaint among other things alleges that on the 20th day of September, 1914, the defendant-in-error, Honolulu Skating Rink, Ltd., entered into an agreement in writing with the plaintiff-in-error whereby the plaintiff-in-error agreed to do all the work included in the erection and completion of a one-story building, to be used as a Skating Rink, upon the premises described in the notice of lien, according to the drawings and specifications made by the architect, and to furnish all labor and materials incident thereto, for the sum of $6,463.60, payable, $2,000.00 on completion and acceptance, $2,500.00 in thirty days from the date of completion and acceptance, and $1,963.60 in forty-three days from the date of completion and acceptance, subject to additions on account of alterations, provided that in each case the architects shall certify in writing that all the work upon the performance of which the payments shall become due has been done to his satisfaction.

That the said building was completed and accepted on the 2nd day of November, 1914, and that the architect has certified in writing that all the work has been done to his satisfaction; that the de-defendant-in-error, Honolulu Skating Rink, Ltd., has paid thereon the sum of $2,470.00 and no more, and that there remains due and unpaid on said first payment of $2,000.00 the sum of $80.00, on said second

payment of $2,500.00, the whole thereof, and on said third payment of $1,963.60, the whole thereof, viz: the sum of $4,543.60 with interest therefrom from the respective dates of payment, all of which the plaintiff-in-error has demanded and the defendant-in-error, Honolulu Skating Rink, Ltd., has failed and refused to pay; that said labor and materials furnished under said contract and said additional work were used in the construction of certain buildings and structures situated on certain land; that said defendants-in-error, Honolulu Skating Rink, Ltd., *Morris Rosenbledt* and *Fred Harrison, are the owners of said land,* building and structures; that the said defendant-in-error, the Honolulu Skating Rink, Ltd., holds a lease on said premises for five years from the first day of November, 1914; that the defendants-in-error, Morris Rosenbledt and Fred Harrison contracted with the defendants-in-error, Honolulu Skating Rink, Ltd., to cause said building and structures to be erected and that, in pursuance of said contract, the said defendant-in-error, Honolulu Skating Rink, Ltd., contracted with the plaintiff-in-error, Wong Wong, to construct the said building and structures upon said land and the plaintiff-in-error furnished said labor and materials to be used, and they were used in the construction of same; that the said building and structures were completed on or about the 2nd day of November, 1914, and that on the 11th day of December, 1914, the plaintiff-in-error duly filed in the office of the Circuit Court of the First Judicial Circuit, within the jurisdiction of said

court, his notice of lien conformable to law and on the same day served a copy of said lien upon said defendants-in-error, a copy of which notice of lien was annexed to the complaint.

The plaintiff-in-error prayed judgment against the defendant-in-error, Honolulu Skating Rink, Ltd., in the sum of $4,543.60, with interest and costs, and asks that the same might be adjudged to be a lien upon said building and structures upon said land and the interest of the defendants-in-error, Morris Rosenbledt and Fred Harrison, and the Honolulu Skating Rink, Ltd., and that the said lands be sold according to law and the proceeds of said sale be applied to the payment of plaintiffs' claim and the costs of suit.

On the 31st day of December, 1914, the defendants-in-error, Morris Rosenbledt and Fred Harrison, filed a plea in abatement to the plaintiff-in-errors' complaint. The hearing upon this plea was delayed for the reason that the question raised thereby, to wit: whether a lessee who is bound by the terms of the lease to make specified improvements on the leased premises may be considered the agent of the lessor so as to subject the reversion of the lessor to mechanics' liens, had been reserved to the Supreme Court of the Territory for decision in an action brought by Lewers & Cooke, Ltd., a corporation, against the same defendants-in-error in the case at bar for the purpose of enforcing a mechanics' lien. (See *Lewers & Cooke, Ltd., vs. Wong Wong,* 22 Haw. 765.) Thereafter, on the 29th day of March, 1915, the defendants-

in-error, Morris Rosenbledt and Fred Harrison, filed a demurrer to the defendants-in-error's complaint which was overruled. On the 20th day of January, 1916, the defendants-in-error, Morris Rosenbledt and Fred Harrison, filed their answer, denying all the allegations of the complaint and giving notice of their intention to rely upon the defense of illegality, fraud, release and payment. The Honolulu Skating Rink, Ltd., default, and on the 11th day of February, 1917, the Honorable C. W. Ashford, First Judge of the First Circuit Court of the Territory of Hawaii, after the plaintiff-in-error had rested his case, granted a motion for non-suit as to the defendants-in-error, Morris Rosenbledt and Fred Harrison, upon the ground that the plaintiff-in-error had failed to show a demand upon the defendants-in-error, Morris Rosenbledt and Fred Harrison, of the amount due and/or the refusal or neglect by them or either of them to pay the same upon demand between the time of the filing of the notice of lien and the institution of the proceedings to enforce the same. From the decision of the Circuit Court, the plaintiff-in-error appealed to the Supreme Court of the Territory, where the judgment was reversed and the cause remanded to the Circuit Court for further proceedings consistent with the view therein expressed. (See *Wong Wong vs. Honolulu Skating Rink, Ltd.*, 24 Haw. 181.) This decision was rendered on the 26th day of March, 1918. Thereafter trial was had in the Circuit Court on the 22nd day of August, 1919, before the Honorable W. T. Edings, Second Judge of the Circuit Court

of the First Circuit, and judgment was rendered against the defendants-in-error, Morris Rosenbledt and Fred Harrison, for the full amount of the plaintiff-in-error's demand. From the decision of the Circuit Court the defendants-in-error, Morris Rosenbledt and Fred Harrison, appealed to the Supreme Court and on to wit: the first day of March, 1920, the Supreme Court of the Territory reversed the judgment of the lower court upon the grounds, first, that there was nothing due which the plaintiff-in-error was authorized to demand payment on the date the demand was made; and, second, that the suit was instituted premature. (See *Wong Wong vs. Morris Rosenbledt and Fred Harrison,* 25 Haw. 347.)

Thereafter the defendants-in-error, Morris Rosenbledt and Fred Harrison, filed a motion in the Supreme Court of the Territory asking that the decision rendered and filed on March 1st, 1920, be amended, which motion was duly granted. (See 25 Haw. 413.) After the case was remitted to the lower court the plaintiff-in-error sued out a writ of error to the Supreme Court assigning as error the ruling of the circuit judge in entering judgment for the defendants-in-error, Morris Rosenbledt and Fred Harrison, and also challenging the correctness of the ruling of the Supreme Court of the Territory in sustaining the exceptions of the defendants-in-error, Morris Rosenbledt and Fred Harrison. The Supreme Court of the Territory affirmed the judgment of the court below, and their former decision, and the plain-

tiff-in-error brings this writ to this Honorable Court. (See 25 Haw. 739.)

POINTS AND AUTHORITIES.

The defendants-in-error contend that the judgment of the Supreme Court of the Territory ought to be affirmed for the following reasons:

I.

THAT THE INTEREST OF THE DEFENDANTS-IN-ERROR, MORRIS ROSENBLEDT AND FRED HARRISON, IS NOT SUBJECT TO A LIEN.

II.

THAT THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST THE DEFENDANTS-IN-ERROR, MORRIS ROSENBLEDT AND FRED HARRISON, FOR THE REASON THAT IT FAILS TO ALLEGE THAT THE PLAINTIFF-IN-ERROR MADE A DEMAND UPON THEM FOR THE AMOUNT OF THE LIEN BETWEEN THE TIME THE LIEN WAS FILED AND THE DATE THE WITHIN ACTION WAS INSTITUTED.

III.

THAT THE MOTION FOR A NON-SUIT MADE BY THE DEFENDANTS-IN-ERROR, MORRIS ROSENBLEDT AND FRED HARRISON, UPON THE GROUND THAT NO DEMAND HAD BEEN

PROVEN AGAINST THEM, SHOULD HAVE BEEN GRANTED.

IV.

THAT AT THE TIME THE PLAINTIFF-IN-ERROR COMMENCED HIS ACTION THERE WAS NOTHING DUE UNDER HIS CONTRACT.

V.

THAT AT THE TIME THE PLAINTIFF-IN-ERROR MADE DEMAND UPON THE DEFENDANT-IN-ERROR, HONOLULU SKATING RINK, LTD., THERE WAS NOTHING DUE WHICH THE PLAINTIFF-IN-ERROR WAS AUTHORIZED TO DEMAND PAYMENT OF.

VI.

THAT IT AFFIRMATIVELY APPEARS THAT THIS COURT IS WITHOUT JURISDICTION OF THE SUBJECT MATTER OF THIS ACTION FOR THE REASON THAT THE SUM OF $5,000.00 EXCLUSIVE OF COST IS NOT INVOLVED.

ARGUMENT.

I.

THAT THE INTEREST OF THE DEFENDANTS-IN-ERROR, MORRIS ROSENBLEDT AND FRED HARRISON, IS NOT SUBJECT TO A LIEN.

Chapter 162 of the Revised Laws of 1915 of the Territory of Hawaii, Section 2863, provides as follows:

"Sec. 2863. Allowed when. Any person or association of persons furnishing labor or material to be used in the construction or repair of any building, structure, railroad or other undertaking, shall have a lien for the price agreed to be paid for such labor or material (if it shall not exceed the value thereof) upon such building, structure, railroad or other undertaking, as well as upon the interest of the owner of such building, structure, railroad or other undertaking in the land upon which the same is situated."

The plaintiff-in-error contends that the word owner as used in the above section refers to the "constructing owner" and that the lien therein provided extends only to his interest in the land.

At common law or in equity mechanics' or materialman's liens upon real property were unknown. It may be properly called a mere creature of statute, and it has been said by many authorities, that "it springs out of the appropriation and use by the land owner of the mechanics' labor or furnishes materials, and rests upon the broad ground of natural equity and commercial necessity." The character, operation and extent of the lien must be ascertained from the terms of the statute creating and defining it. A person who seeks to obtain and enforce a mechanic's lien must show that he is entitled to it under the statute and in a proceeding to enforce the lien the burden is upon him to show that he has complied with all the provisions of the statute, and that the

property upon which the lien is claimed is such as the Legislature intended should be subjected thereto.

The Supreme Court of the Territory in the case of *Emmeluth vs. Ah In Kwai,* 20 Haw. at page 180, indicates quite clearly that the only interest which is subjected to a lien is that which the person who contracted for the improvements has in the land sought to be subjected thereto. The language is as follows:

"*In the great majority of cases buildings are erected only by those who have an interest in the land upon which they stand. That interest may be the fee or it may be something less. It may be for a long or a short period, and it may in some cases perhaps, permit or require the removal of the building at the expiration of the term.* But whatever the case, if it be seized jointly with the building, the value of the land to the lienor and to the purchaser will, it is obvious, be ordinarily much greater than if the interest in the land were not also liable for the debt."

In *Lucas vs. Hustace,* 29 Haw. at pages 693 and 694, the Supreme Court of the Territory in construing Section 2863 of the Revised Laws says:

"Some statutes granting liens * * * have perhaps been supported upon this theory of agency and consent of the owner. That, however, is not the theory prevailing in Hawaii,"

and in discussing the doctrine of certain Pennsylvania cases, the court on page 697 said:

"These proceed upon the theory of agency and consent above referred to, have been disapproved by the Supreme Court of the United States, and are in conflict with the view already taken by this court. * * *

As to the method of the creation of the lien and the theory upon which the law is to be upheld."

In *Allen & Robinson, Ltd., vs. Reist,* 16 Haw. at page 23, the following appears:

"Although a mechanic's or materialman's lien is a creature of statute and not of contract, yet it is dependent upon and does not exist in the absence of contract. There must be a contract with the owner. A mere trespasser who erects a building on the land of another has no lien. The contract with the owner may be either direct with the mechanic or materialman who claims a lien or it may be with an intermediate contractor, in which latter case, there should be a second contract between the contractor and the subcontractor or materialman. It is necessary to allege the contractual relation. Otherwise the complaint would not show facts upon which a lien could be founded. In the present case, an expressed contract was alleged between the owner and the materialman, but the proof was of a contract between the owner and a contractor and a second contract between the contractor and sub-contractor or materialman. The contract alleged was not proved. The contracts proved were not alleged. The mere allegation that the plaintiff furnished materials which were used in the defendant's buildings was not sufficient for the enforcement of the lien."

It might be well to state that the Supreme Court of the Territory by a divided court in the case of *Lewers & Cooke, Ltd., vs. Wong Wong,* 22 Haw. 765, has decided this point adversely to the defendant-in-error. That case, however, was before the Supreme Court upon a reserve question and cannot even be considered the "Law of the Case" because in the case of *Morris Rosenbledt, Trustee, vs. Ernest Wode-*

house, 25 Haw. 561, it is held that the rule generally referred to as the law of the case does not apply to interlocutory decisions and decisions on *reserved questions.* We believe the construction placed upon the statute under consideration in the dissenting opinion of Justice Watson is the true rule and ought to be adopted by this court.

The learned Chief Justice who wrote the majority opinion, speaking of the contractual relation required by the statute, says:

"In the case at bar the lessor's contract was with the lessee, and it, on the other hand, contracted with the builder who in turn contracted with the materialman. The requirement that there must have existed a contractual relation was, therefore, met."

It appears to us that the court must have lost sight of the provisions of the lease or contract between the lessee and lessor. The lease specifically provides that all improvements shall be made at the expense of the lessee and recites further:

"And it further covenants and agrees with the lessor that it shall and will within two months from the date hereof cause to be constructed and completed upon said demised premises in a good workmanlike manner, of the best materials of their several kinds, a one-story frame building; that it shall and will expend in the construction of said building not less than the sum of $6,000.00," etc. (See Plaintiff's Exhibit "E," Rec., Vol. 11, page 811.)

The Chief Justice further states:

"The lessors, thus, were parties to the erection of

the building, and the lessee was their agent, not for the purpose of creating any personal liability against them, but to cause the improvement to be placed upon the land."

In other words, while there was a contract to improve the lessors' land, there was no contract creating an indebtedness upon the part of the lessors. Not only, however, must a contract exist by the owners of the land, but a contract creating an indebtedness on the part of the owners must be shown.

In Jones on Liens, Sec. 1235, the following language appears:

"A contract, express or implied, of the owner of the land is necessary to the establishment of a mechanic's lien upon it. The lien, however, is created, not by the contract, but by furnishing the materials or doing the work in the contract. *Yet a contract creating an indebtedness on the part of the person whose property is to be charged with a lien must exist in the first place, and then the performing of the labor or the furnishing of the materials under the contract creates the lien.*"

There is no contract which creates an indebtedness on the part of the lessors in the case at bar. Agency in the matter of a contract for material and labor so as to bind the premises upon which it is placed must be shown to exist as it is required in all other cases of agency. In this Territory there is no statute nor is there any principle which can be called into requisition which makes the lessee the agent of the lessor. On the contrary, as was said in *Lucas vs. Hustace,* 20 Haw. 693, "Some statutes granting liens

* * * have perhaps been supported upon this theory of agency and consent of the owner. That, however, is not the theory prevailing in Hawaii.' And in discussing the doctrine of certain Pennsylvania cases the court adds:

"These proceed upon the theory of agency and consent, above referred to, have been disapproved by the Supreme Court of the United States and are in conflict with the view already taken by this court. * * * As to the method of the creation of the lien and the theory upon which the law is to be upheld."

Again in the case of *Albaugh vs. Litho-Marble Decorating Co.,* 14 App. Cas., D. C. 113, the court said:

"This covenant (to improve) involves no theory of agency but quite the reverse. The parties to the lease dealt with each other not as principal and agent but practically as adverse parties."

Parties furnishing material or doing work for a leaseholder undoubtedly may have a lien against the particular estate of the leaseholder, but to hold the owner of the property responsible and his estate in the property responsible would be to put the landlord at the mercy of the tenant. Under such circumstances, the tenant could make any kind of improvements at the expense of the property. The following citations are directly in point and throw much light upon the point under consideration:

20 Am. & Eng. Enc. L., p. 314, contains the following:

"Improvements Made with Consent of Owner—In some jurisdictions *the statutes provide* that mechanics' liens shall attach when labor is performed, or services are rendered in the erection of buildings, etc., under an agreement with or with the consent of the owner; thereby enabling persons *other than the owner* to subject the property to mechanics' liens for its improvements where such improvements are made with the consent of the owner."

The modern statutes upon mechanics' liens nearly all contain the provision that laborers and materialmen shall have a lien when the labor or materials shall have been performed or furnished by virtue of a contract with or with the consent of the owner of the land. The agreement or consent of any person having authority from or rightfully acting for such owner in procuring or furnishing such labor or materials has by express provision in several states the same effect as the agreement or consent of the owner. In these states, however, the statutes are not at all similar to ours.

Jones on Liens, Sec. 1251, contains the following:

"Consent of Owner—There is a broad distinction between *statutes* which provide for a lien for work performed or materials furnished, *by virtue of the contract of the owner or his agent,* and those which provide for the lien for work and materials furnished *with the consent of the owner. Under the former, no lien can be sustained unless a contract of the owner, express or implied, is proved*; while under the latter a lien may be sustained when the *owner's consent can be implied from his acts or declarations,* or from the circumstances attending the transaction. In such case it is not necessary to show that the acts of the mechanic or lien claimant should have been in any

way induced by the consent of the owner."

An examination of the later authorities will show that the mechanic's lien statute has been amended to such an extent that it is no longer necessary, in order to charge premises with a lien that a contract exist between the owner of the land and the person seeking to enforce a lien. As laid down in the above authority, "under the former no lien can be sustained unless a contract of the owner expressed or implied is proved, while under the latter a lien may be sustained when the owner's consent can be implied from his acts or declarations, etc."

Jones on Liens, Sec. 1276, provides as follows:

"Interest of Lessor Not Subjected by the Lessee —In general, the interest of a lessor cannot be subjected by the lessee to a mechanic's lien for work done or materials furnished on the contract of the lessee or of anyone claiming under him. To bind the lessor's interest his agreement or consent must be shown. * * * Neither his agreement nor consent can be implied from the relation existing between him and the lessee."

20 Am. & Eng. Enc., L. 317, provides as follows:

"Leases — In General — While the lessee is regarded as an owner in so far that he may subject his leasehold estate to mechanic's liens for improvements upon the estate, *he cannot, as a general rule, impose any charge upon the reversion or estate of the lessor therefor, and the fact that the lessor acquiesces in the improvements by the lessee does not subject his reversion to the mechanic's lien therefor.* So also the fact that the lessee is entitled to deduct the

cost of repairs for improvements from the rent does not subject the reversion to mechanics' liens for such improvments and repairs. So also the mere consent of the lessor given in the lease to make the improvements or repairs does not subject the estate of the lessor to a mechanic's lien therefor."

20 Am. & Eng. Enc., L. 317, speaking of improvements by lessees with the consent of lessors, lays down the following rule:

"When the *statute provides* for mechanics' liens in favor of persons furnishing materials or performing labor upon improvements, etc., erected *with the consent of the owner* in case a lessee contracts for such improvements with the consent of the lessor, the mechanics' liens will bind the interest of the lessor."

Could it be said, however, that where the statute provides the erection or improvement to be made by the consent of the owner of the land that a lessee under contract to make the improvements is therefore the agent of the lessor and the estate of the lessor is thereby bound?

Even under statutes last referred to, the law is well settled that the lessee in making the improvements is not the agent of the lessor within the meaning of the statute.

In 20 Am. & Eng. Enc., L. 317, the following language appears:

"Lessee as Agent of Lessor—A lessee contracting for improvements upon the demised premises does not, merely by virtue of his relation as lessee, contract as the agent of the lessor, so as to subject the property to mechanics' liens therefor. Under a

provision in a lease expressly requiring the lessee to make specified improvements or repairs, the lessee *in so doing has been held not to act as the agent of the lessor so as to subject the reversion* of the lessor to mechanics' liens therefor."

The mechanics' lien statute of Massachusetts is very different from our statute. In the case of *Aipa Francis and others vs. Maria F. Sayles,* 101 Mass. 435, the following facts appear:

On January 1, 1868, the respondent being owner in fee of an estate on Freemont Street in Boston, demised the premises to Edmon S. Lucas for the term of twenty years by a lease recorded in the registry of deeds. The lease contained no covenant against underletting or assignment and did contain a covenant by which Lucas agreed that "he will immediately proceed to build upon the rear lot an addition to the main building at least one story high above the ground, and at seasonable times to put the present building in repair, all at his own expense and in good workmanlike manner and at a cost of not less than $4,500.00." On February 28, 1868, Lucas underlet the premises for the term of ten years to Alexander C. Felton, who soon after taking an underlease began to convert the lower floor of the building into an apothecary's shop. None of the labor was performed on the addition to the main building mentioned in the lease from the respondent Lucas.

The court uses the following language:

"The statute of 1819, c. 156, which appears to have been the first of many which have been enacted in

this commonwealth on the same subject, provided that every person who should by contract in writing with the owner of any piece of land, furnish labor or materials for erecting or repairing a building, shall have a lien upon the land for the amount due for such labor or materials. *It was also provided* (see Revised Statutes, c. 177, 326) *that the person who procured the work to be done should be considered as the owner for the purposes of process and to the extent of his right and interest though he should have an estate for life only, or any other estate less than a fee simple,* and that the lien should bind his whole estate and interest in the land. The law now in force (see Statutes, c. 150) has done much to extend the remedy to a large class of cases, and to make it more convenient of enforcement. It is no longer restricted to the case of written contracts and it is sufficient to show, that a debt is due for labor or materials furnished by virtue of an agreement with, or by consent of, the owner of the building or structure, or any person having authority from or rightfully acting for such owner, in procuring or furnishing the labor or materials. But there is no substantial change in the mode of proceeding in order to enforce the lien and although the thirty-third section of the present statute is not expressed in the same language as the twenty-sixth section of the Revised Statutes, c. 117, we do not think it was intended to produce any radical or substantial change of the law in relation to that particular subject matter.

"The order of notice issued upon the filing of the present petition in court has been served upon the lessor only. No other party has been summoned in to answer, and apparently the petitioners do not expect or intend in the suit to enforce any claim against the estate of the lessee in the land and building, although by the terms of the statute, his estate is expressly made liable, and he was the party who undertook to cause the building to be erected or repaired. Does the law authorize the holder of such

a lien to pass over, and leave wholly unmolested and untouched, the estate of the lessee, which may be for a long term of years or that of a tenant by courtesy, for example, which is for life, and at his mere will and choice to throw the whole burden of expensive improvements upon the reversion and enforce the claim by a sale of the reversion? If so, it is easy to see that the position of the land owners who have given what are called building leases may be subjected to great embarrassment. It may be that the right of the reversioner is very remote, and he may be wholly unable to regulate or prevent the operations of the intermediate tenant. He may have a mere contingent remainder, in which the rights of persons, not yet in being, are implicated. But we do not understand that the law gives to the holder of the lien any such arbitrary and unreasonable option.

"*It is very clear that as the law stood under the Revised Statutes, the person spoken of as 'owner of the land' was the person who made the original building contract. He is variously spoken of in the chapter on the subject, as the owner, the contractor, the debtor, the party who procures the work to be done*; 'by which various designations the same person is intended. Such is the party intended to be the defendant and to be summoned in the suit.' *Howard v. Robinson,* 5 Cush. 119, 122. The statute now in force, instead of speaking of the owner in the land, uses the phrase 'owner of the building or structure.' It is no longer needful to show that he made the contract, but it must still appear that he agreed or consented, or that some person having authority from or rightfully acting for him agreed or consented. He is still the person variously spoken of in the statute as the contractor, the debtor and the person for whom the work is done. The thirty-third section of the general statutes, c. 150, very plainly shows that the person for whom the work is done having an estate for life only or other estate less than a fee simple is the person of whom it is said 'the creditor may cause the right of redemption, on

whatever other right or estate the owner had in the property, to be sold and applied to the discharge of his debt according to the provisions of the chapter.' He is the party intended to be defendant and to be summoned in the suit. It would be a great stretch of construction to say that the lessor whose demise really has the effect of an alienation so long as the term lasts, and who has parted with the control of the property during that time, agrees or consents, or authorizes anyone to consent for her to the contract under which the petitioners claim. The case finds that none of the labor was performed on the additions to the main building for which the lease to Lucas provided. The most that can be said would be that she did not object to proceedings by her lessees, which she may have had no power to prevent, if she had the wish to do so.

"It may be said that, although an estate less than a fee simple may be a long term of years, yet it may also be a very short term of years or months. But we may well suppose that the Legislature assumed that a tenant for a short term would not be likely to make improvements for the benefit of the reversion at his own expense, and that there was no practical necessity for a statute provision to meet such a contingency. They may also have concluded that there was no hardship under the circumstances, in leaving it to the carpenter or mason to inform himself as to the nature of the interest."

We think the reason advanced in the above authority is applicable to the case at bar. Even under statutes where the phrase "owner of the land" is used, it will be seen that in order to charge a lessor's estate with the expense of repairs or improvements made by the lessee, there must be affirmative evidence that he agreed to pay for the improvements or impliedly consented that his estate should be bound.

In order to bind the estate of the lessor the language used in the statute relative to mechanics' liens must grant that authority.

In *Knapp v. Brown,* 45 N. Y. 211, the Supreme Curt of New York in construing a mechanic's lien statute which is nearly identical with ours, uses the following language:

"From the facts found it appears that Mrs. Jackson was the owner of the premises and leased the same to Brown for a term of years at a specified rent, and that the latter in addition to the payment of the rent *covenanted with her to make at his own expense certain specified repairs to and altering of the building upon the premises which were to be left upon the premises by him at the expiration of the term*; that Brown employed the plaintiff to furnish the materials for and do the work upon the repairs and alterations. Section 1 of the Act of 1863 (p. 859) provides that any person who shall thereafter as contractor, etc., in pursuance of or in conformity with the terms of any contract with or employment by the owner, or by or in accordance with the directions of the owner, or his agent, perform any labor or furnish any materials towards the erection of or in altering or repairing of any building or buildings in the city of New York on compliance with the 6th section of the Act shall have a lien for the value of such labor and materials upon the house and appurtenances and lot upon which the same shall stand to the full value of such claim or demand, to the extent of the right, title and interest then existing of the owner of said premises. Mrs. Jackson was the owner of the reversion of the premises and would be entitled to the possession of the same upon the expiration of the term of Brown. *By construction of this section no lien can be created upon the interest of any person as owner of the premises, except such person shall either himself or by his agent enter*

into a contract for doing the work, either express or implied, as the lien is only authorized as against owners so contracting for or employing persons to do the work. That this is the true construction is manifest not only by the language of the section but by Section 14 of the Act.

"* * * Section 9 of the Act leads to the same conclusion. That section provides that the contractor shall be personally liable to the lienor for the whole amount of his indebtedness, *and the owner to the extent of the amount due by him to his contractor. This, although confined to the personal liability of the parties, shows that to authorize the lien there must be employment by the owner to create any liability against him under the Act. In the present case there was no employment of the plaintiffs by Mrs. Jackson. She was in no respect indebted to Brown for or on account of the work.* She had conveyed to him an interest in the land in part for the consideration of his doing the work. *He alone employed the plaintiffs to do the work. He was the owner within the Act and his interest in the premises only is made subject to a lien by the Act.* This is no hardship upon the plaintiff. He, before entering into the contract, could readily have ascertained the extent of Brown's interest in the premises, and consequently the adequacy of the lien as security."

In *Muldoon v. Pitt et al.,* 54 N. Y. 269, the foregoing decision is affirmed and an examination of the language used shows quite clear that in order to charge the estate of an owner of land, he must contract the indebtedness himself and that a contract made by a lessee for improvements does not have the effect of subjecting the estate of the lessor to a mechanic's lien. The language is as follows:

"This was a proceeding in the Common Pleas of

New York under the mechanics' lien law of 1863. It involved the construction of the 6th section of the Act which defines the cases in which a lien shall exist, and the precise inquiries necessary to be answered in order to dispose of this case is in what sense the word *'owner'* is employed in that section. The section provides that any person who should thereafter * * * in pursuance of or in conformity with the terms of any contract with or employment by the owner, or by or in accordance with the directions of the owner or his agent, perform any labor or furnish any material towards the erection of any building in the city of New York, should, on complying with the 6th section of the Act have a lien for the value of such labor and materials—upon such building and the appurtenances, and lot on which the same shall stand, to the full value of such claim or demand, and to the extent of the right, title and interest then existing of the owner of said premises. The settled construction of this section is that no lien can be created on the interest of any person as owner of the premises except such person shall either himself or by his agent, enter into a contract for doing the work either express or implied. All this is implied in the expressions describing the conditions which are necessary to a lien. To that end, the labor or materials must be furnished in conformity with a contract with or employment by, or by the directions of the owner or his agent. Together these phrases mean contracts express or implied; and no one is owner in the sense of this statute who is not contractor also for having the work or materials expended or performed upon this land. *Knapp v. Brown* (45 N. Y., p. 207) is fully in point and establishes the construction stated. The appellants were the owners in fee of the lot in question and had leased it for a dwelling and bathing establishment to Veerkant for five years. He covenanted that no alteration should be made on the premises except in basement floor and cellar, with-

out the written consent of the appellants for such purpose, and that such changes of doors, windows, partitions, plumber's work, etc., and all things belonging thereto should be restored as they were at the commencement of the lease, prior to its end by the lessee, at his own expense, if the lessors desired.

"Veerkant contracted with Muldoon, the appellants did not. Their only instruction was by way of supervision to see to it at Veerkant's request that the building to be erected for him and the alterations to be made in the existing building should be suitable to his interest and not injurious to theirs; they not having given any consent in writing to alterations. These directions, however positive and effectual in regulating the work, did not constitute them, in any sense parties to a contract, express or implied, with Muldoon. The testimony left no room for any other conclusion, and the Common Pleas were well warranted in reversing the decision of the referee in respect to these defendants."

In *Cornell et al. v. Barney et al.,* 94 N. Y. 397, the wording of the lease was nearly identical with that in the present case. Judge Earl wrote the following opinion:

"In June, 1877, the respondent Barney entered into an agreement with the defendant Salem whereby he leased to Salem a lot of land, situate in the city of New York, to hold from that date for 15 years from the 1st day of January thereafter, for the yearly rent, payable quarterly, of $4100 besides taxes and assessments, and Salem agreed before the 1st day of January to erect upon the lot a building which was to cost and to be fully worth the sum of $58,000.00. Barney agreed to loan and advance to Salem from time to time during the progress of the building the sum of $25,000.00, no part of which, however, was to be advanced, except on the presentation by Salem if required, of evidence that he had expended

an equal sum upon the building. When the sum of $25,000.00 had thus been fully loaned, Salem was to execute a mortgage upon his interest in the building to Barney to secure the payment thereof in annual payments. In case Salem erected the building and kept all his covenants, Barney agreed that at the expiration of the term he should have another lease for a further term of 15 years at a rent to be agreed upon, etc. During the continuance of the lease Salem was to keep an insurance against loss by fire upon the building upon the lot for the sum of $50,000.00, and in case of loss the amount of the insurance money received was to be used in repairing or rebuilding the buildings. In case Salem failed to renew the lease at the end of any term or in case he failed to keep the covenants and also at the end of the final term the lot with all the buildings thereon was to revert to and become the absolute property of Barney, his heirs or assigns.

"Under this agreement, which was recorded in the proper office in the city of New York, on the 19th day of September, Salem took possession of the lot and commenced to erect a building thereon. On the 22nd day of October he entered into a contract with the plaintiffs to furnish the iron to be used in the building, for which they were to be paid by him the sum of $8,000.00. In performance of their contract they furnished iron for which they were entitled to be paid $5,500.00 and for which they were paid only the sum of $1,500.00, the first installment. To secure the balance on the 13th day of December they filed a lien upon the lot and building in the clerk's office of the city and county of New York and this action was subsequently commenced to enforce such lien.

"We are of the opinion that the court below properly decided that the plaintiffs were not entitled to have or enforce any lien against the interest of Barney in the lot or building thereon, for the reason that the iron was not furnished under any contract with him, or at his instance, and that he did not cause the building to be constructed.

"Section 1 of the Lien Act applicable to the city of New York (Chap. 379 of the Laws of 1875), provides that 'every person performing labor upon or furnishing materials to be used in the construction, etc., of any building, etc., shall have a lien on the same for the work or labor done, or materials furnished by each respectively whether done or furnished at the instance of the owner of the building or other improvement, or his agent. To give a lien under this section, the work must have been done or materials furnished at the instance of the owner of the building or the improvement, or at the instance of his agent, and the lien is upon the building or other improvement.' Such is the plain language, and there is no room for construction. *Here the iron was not furnished at the instance of Barney. His contract with Salem did not even require any iron to be used in the erection of the building, and it does not appear that he had anything whatever to do with Salem's contract with the plaintiffs, or with the procurement of the iron from them or that he knew anything about it. It is true that Salem covenanted with Barney to erect the building and that Barney agreed to advance money to be applied towards the erection of the same, and that he was to have a mortgage on the same; yet the building was not erected for Barney and was not, before the termination of the lease, to belong to him, and in no proper sense could the material furnished for the same be said to be furnished at his instance.* In harmony with this view is Section 2 of the Act which provides that 'any person, who at the request of the owner of any lot, etc., grades, fills in, or otherwise improves the same or the sidewalk or street in front of or adjoining the same shall have a lien upon such lot for his work done and materials furnished.' Here the word 'request' is used in substantially the same sense as the word 'instance' in the principal section, and was intended to have the same scope.

"Section 1 having provided for a lien upon the building, Section 3 provides for a lien upon the lot

upon which the building stands as follows: 'The land upon which any building, etc., is constructed, etc., shall be subject to the liens if at the time the work was commenced or materials for the same had commenced to be furnished, the land belonging to the person who caused said building, etc., to be constructed, etc., but if such person owned less than a fee simple estate in such land, then only his interest therein shall be subject to such lien.' The plaintiffs have no lien under this section upon Barney's interest in the land because he did not in any proper sense cause the building to be constructed. Within the meaning of this section the building must be constructed for him at the expense of the owner of the land or under contract with him. Salem caused this building to be constructed and the plaintiffs could have a lien upon his interest in the land under his lease.

"In construing the portion of this Act now under consideration we are not much aided by a reference to other lien Acts. The language giving the lien in this Act has not the same scope as that contained in the Act, Chapter 478 of the Laws of 1862 in which a lien is given where a building is erected upon the land by the permission of the owner or as that contained in the Act, Chapter 489 of the Laws of 1873, in which a lien is given where a building is erected upon the land with the consent of the owner, which Acts come under our consideration in the cases of *Buckett v. Hayes,* 79 N. Y. 273, and *Otis v. Dodd,* 90 id. 336. The vividly different language used in this Act enacted subsequently to these Acts must be held to indicate a different legislative purpose.

"The Act, Chapter 500 of the Laws of 1863 provided that 'any person who shall as contractor, laborer, workman, merchant or trader in pursuance of or in conformity with the terms of any contract or employment by the owner, or by or in accordance with the directions of the owner or his agent, perform any labor or furnish any material towards the erection, etc., of any building, shall have a lien' upon

the house and the lot upon which it stands. The words 'with the direction of the owner or his agent' in that Act must certainly have as broad scope as the word 'instance' in this Act, and they were held to give a lien only in case there was a contract, express or implied, with the owner of the land for doing the work or furnishing the materials. (*Kugg v. Brown,* 45 N. Y. 207; *Muldoon v. Pitt,* 54 id. 269.) In *Heckman v. Pinkney* (81 id. 216), we held, considering all the provisions of the Act of 1875, that a subcontractor with one who had contracted with the owner could have a lien upon the interest of the owner in the lot or building for any amount which the owner was liable to pay; but the opinion in that case does not give any countenance to the claim that the interest of the owner can be subjected to a lien except when he has contracted for the building or improvement for which the work and materials are furnished, or except they have been furnished at his instance and request.

"It must at least be said that the construction of this Act, so far as the same now involved, is not free from doubt, and, therefore, the construction given to it by the courts in the locality where the Act in view of all the circumstances and difficulties bearing upon its execution, should have great weight with us and so far as we can ascertain, it has been uniformly construed there in accordance with the views above expressed."

Jones on Liens, Sec. 1280, contains the following rule:

"Covenant to Build or Repair—The interest of the lessor is not subject to a lien for labor or materials furnished under a contract with a lessee, although the lease contains a covenant that the lessee shall erect a building, or shall make certain repairs or alterations of existing buildings, and provides that at the end of the term or earlier determination

of the lease by reason of the lessee's failure to perform his covenants, the building or improvements shall revert to and become the property of the lessor. (Citing *Cornell v. Barney,* 94 N. Y. 394; *Rothe v. Bellingrath,* 71 Ala. 55; *Mills v. Matthews,* 7 Md. 315; *McCarthy v. Carter,* 49 Ill. 53, 95 Am. Dec. 572; *Dutro v. Wilson,* 4 Ohio St. 101.) *In such case a lien cannot be enforced against the interest of the lessor, but only against that of the lessee, in the absence of evidence that lessor had some connection with the contract for labor or materials other than that implied by the terms of the lease. Even if it be provided that at the termination of the lease the value of the improvements shall be paid by the lessor or deducted from the rent then due, this does not constitute, the lessee the agent of the lessor in contracting for labor or materials, nor does it make him liable to pay for them.* (Citing *Francis v. Sayles,* 101 Mass. 435.)

"The estate of a lessor is not subject to a lien for labor contracted for by his lessee who has covenanted to make all necessary repairs and improvements at his own expense. (Citing *Francis v. Sayles,* 101 Mass. 435; *Conant v. Brackett,* 112 Mass. 18; *Grant Wood Lumber & Supply Co. v. Abbott,* 80 N. J. L. 564, 78 Atl. 1046.) It does not matter that the repairs and alterations made are apparent, and that the lessor lives in the immediate neighborhood. But it has been held that if the improvements are ultimately to be at the expense of the lessor, though at the time paid by the lessee, the lessor's estate is liable to a lien therefor. Thus, where the agreement was with the lessee to make certain improvements at his own expense, but the lessor as compensation for them was to give the lessee a lease for ten years, with the use and occupation of the property as improved, when the improvements should revert to the owner, it was held that the lessor's interest was subject to a lien therefor."

In Pennsylvania, under the statute where repairs or improvements made by a tenant are really made

at the expense of the landlord either in money or in the use of the premises, the tenant is regarded as the agent of the landowner in making them and the landowner's interest or estate may be subject to a lien for such repairs or improvements. If, however, the repairs or improvements are to be made at the expense of the lessee solely, as in the case at bar, the estate of the lessor is not subject to a lien.

In *Boteler v. Aspen,* 99 Pa. St. 315, the language of the Supreme Court of Pennsylvania is as follows:

"It is certainly true, that when the landlord in this case exacted from the tenant a covenant that he should make all necessary repairs to the premises demised, they thereby consented that such repairs should be made. But the question that arises is whether this is the kind of consent which is within the contemplation of the Act of 1868 subjecting the building of an owner to a lien for repairs done by the tenant. We held in *McClinlock v. Criswell,* 17 P. F. S. 183, that the consent intended by the Act is an absolute consent consistent with the right to do the work on the credit of the building. In that case, it was agreed that the work should be done at the cost of the tenant and for that reason we decided that the consent of the landlord must be regarded as qualified, and not as an absolute consent, and therein the Act was inapplicable. In other words, the circumstance that the tenant and not the landlord was to defray the expense of the improvement, was conclusive that neither the landlord nor the building was to be subject to the cost of the work. In *Hall v. Parker,* 8 W. N. C. 325, the demised premises were held subject to the lien because although the tenants were to do the work at their own cost, yet they were to be practically repaid by an abatement of rent for the first year from $600.00 to $500.00 so that in effect

the cost was really to be borne by the lessor. Here also the test of the question was, who was to bear the cost of the repairs? If the landlord, the building was subject to the lien, but if the tenant, it was not. The particular form of words employed was not regarded, but rather the substance and meaning of the contract. How is it in the present case? The building leased was the Clarenden Hotel, No. 1020 Chestnut Street, Philadelphia. * * * By the terms of the lease the tenant was to perform a number of covenants and amongst the rest, was one by which he agreed to make all necessary repairs to the premises demised, including the roof and windows. He was to make no alterations or improvements without the lessor's consent and at the expiration of the term, he was to leave all such alterations and improvements on the premises without cost to the lessors. There was no express stipulation that the tenant was to make the necessary repairs at his own cost. But he was to make them nevertheless and he was to do this in addition to paying the rent. There was no provision that the repairs should be made at the cost of the lessors, or that they should be deducted from the rent or that the rent should be made lower on account of the repairs being made by the tenant. * * * We are of the opinion that in such circumstance, the obligation of the tenant to pay the cost of the repairs, clear and undoubted as if words to that effect were incorporated in the lease. Had they been written in the lease the case would have been the same as *McClinlock v. Criswell.* But in legal effect they are there. the obligation of the tenant to make the repairs includes the obligation to pay for them. It is his covenant, his act, and must be performed by him, and necessarily at his cost. *Clearly, then, these repairs are not to be made at the cost of the lessors, and that being so, it follows that the consent given by them, to their being made by the tenant, is not the unqualified consent which, as we have heretofore held was essential,* to subject the building to *the operation of a mechanic's lien under the Act of 1868.*

"In *McClinlock v. Criswell,* Williams, J., in delivering the opinion of the court said: 'It seems to us that the consent intended by the Act under which the claim in this case is filed is an absolute consent —such a consent as is consistent with the right to do the work, on the credit of the building, though it may not expressly authorize it. It must not be clogged with the right to charge the building with the cost of the work, or which impliedly forbids it.' *We cannot think that when these lessors required of their tenant, that he should make all necessary repairs, they meant thereby that he might do so on the credit of the building. The absolute covenant of the tenant, that he would make the repairs, as well as pay the rent, without any provision for reimbursement or compensation in any manner, is certainly inconsistent with the right to charge the building with the cost of the work.*

"* * * Being of the opinion that it was the intent of the parties to this lease, that the cost of the necessary repairs was to be borne by the tenant, we can not consider the consent of the landlords such as is required to subject their property for that purpose."

It is obvious that under no construction of the Act under consideration could it be said to extend a mechanic's lien to the premises of the fee owner for an indebtedness created by the lessee.

It follows from the foregoing authorities that the interest of the defendants-in-error,Morris Rosenbledt and Fred Harrison, is not liable to a materialman's lien. It is also obvious under the statute that the word "owner" as used applies to the contractor only or the person who made a contract for the improvements. Since the plaintiff-in-error furnished the materials pursuant to the lease as alleged and it affirmatively appearing in the lease that the building

was to be made at the expense of the lessee, under no theory can it be said that the lessee at the time he entered into the contract with the plaintiff-in-error was acting as agent for the defendants-in-error, Morris Rosenbledt and Fred Harrison. To hold that the interest of the defendants-in-error, Morris Rosenbledt and Fred Harrison, is subject to a materialman's lien is judicial legislation.

II.

THAT THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST THE DEFENDANTS-IN-ERROR, MORRIS ROSENBLEDT AND FRED HARRISON, FOR THE REASON THAT IT FAILS TO ALLEGE THAT THE PLAINTIFF-IN-ERROR MADE A DEMAND UPON THEM FOR THE AMOUNT OF THE LIEN BETWEEN THE TIME THE LIEN WAS FILED AND THE DATE THE WITHIN ACTION WAS INSTITUTED.

Section 2867 of Chapter 162 of the Revised Laws provides among other things:

"The liens hereby provided *may after demand and refusal of the amount due, or upon neglect to pay the same upon demand,* be enforced by proceedings in any court of competent jurisdiction, by service of summons as in other cases."

In *Lewers & Cooke, Ltd., vs. Joe Fernandez and Ida W. Waterhouse,* 23 Haw. at page 744, the Supreme Court of the Territory of Hawaii in constru-

ing the above section uses the following language:

"We are unable to agree with this contention but take the view that under the provisions of Section 2867, supra, *that after the notice of lien is filed, and copy thereof served upon the owner, demand upon the owner for the amount claimed under the lien is a condition precedent to bringing suit for its enforcement, and the fact of making such demand must be alleged and proven. To hold otherwise would be to eliminate material terms of the statute.* The object and purpose of these statutes is to provide protection to one who furnishes labor or materials used in the construction of a building which he may have enforced upon certain conditions precedent, one of which is demand for payment upon the owner of the building. Looking at the purpose and intent of these statutes there *is no doubt that the person upon whom demand must be made before commencing an action is the owner of a building or construction upon which the lien is claimed.*"

The only allegation of demand in the complaint in the case at bar is on page 3 thereof, and is as follows:

"That the defendant, the Honolulu Skating Rink, Ltd., has paid thereon the sum of $2,470.00. * * * And there remains due and unpaid on said first payment of $2,000.00 the sum of $80.00, etc., with interest therefrom, from the respective dates of payment, *all of which the plaintiff has demanded and the defendant, the Honolulu Skating Rink, Ltd., has failed and refused to pay.*"

It will be noted, first, that the complaint fails to state the time when the demand was made, and secondly it fails to allege upon whom the plaintiff made the demand. Since the statute after giving the right

to file the lien makes it a condition precedent before bringing suit to enforce the same, that the lienor make demand upon the owner for the amount claimed, it must be alleged in the complaint that the demand was made upon the owner *after the notice of lien was filed,* and a complaint which fails to allege a demand after the lien attached and prior to the filing of the suit, fails to state facts sufficient to constitute a cause of action.

The complaint fails to allege any demand whatsoever at any time upon the defendants-in-error, Morris Rosenbledt and Fred Harrison, and for this reason alone we believe the complaint fails to state facts sufficient to constitute a cause of action against them. If the lessors' interest is subject to a lien in the case at bar, and they are owners within the meaning of the statute, they were certainly entitled to be given an opportunity to avoid a suit and it was the duty of the plaintiff-in-error to make demand upon them in order to charge their interest.

In *Gilbert Scott, Plaintiff-in-Error, vs. M. A. Marshall, Defendant-in-Error,* 56 Georgia 148, the Supreme Court of Georgia in an action to enforce a lien held that the failure to allege a demand prior to the suit was jurisdictional. The court says:

"According to the general principles of pleading, time should be averred in connection with every material fact. 2 Kelly, 92; 8 Georgia, 178. In the summary enforcement of liens, demand is so material that it stands in place of suit. It is the only notice which the debtor has prior to the actual seizure of his property."

In *Lewers & Cooke, Ltd., vs. Wong Wong,* 24 Haw. at page 39, the plaintiff furnished material for the building in the case at bar, but failed to allege a demand, and the court gave judgment for the defendants, holding that demand must be made upon the defendants-in-error, Rosenbledt and Harrison, the ruling in the Fernandez case above was affirmed and Chief Justice Robertson uses the following language:

"That provision, in the case of *Lewers & Cooke vs. Fernandez,* 23 Haw. 744, was held to apply in a proceeding instituted against an owner and a contractor by a materialman, the court expressing the view that after notice of lien is served *demand upon the owner for the amount claimed under the lien is a condition precedent to the enforcement of the lien.* It is contended that that case was incorrectly decided; that it is in conflict with the decision in *Hopper vs. Lincoln,* 12 Haw. 352; and that it is inconsistent with the ruling made in the former decision in the case at bar to the effect that the mechanics' liens statute, in its remedial aspect, is to be liberally construed. The opinion in *Hopper vs. Lucas* stated that "the only question raised by the exceptions is whether an execution could properly issue upon a judgment for the enforcement of a lien against the property covered by it." The provisions of the statute relating to demand was not involved or referred to in that case. And this is true also of the case of *Allen & Robinson vs. Redward,* 10 Haw. 151, which is cited in the appellants' brief. In two cases cited by the appellant, *Steel Brick-siding Co. vs. Muskegon M. & N. Co.,* 98 Mich. 616, and *Duckwall vs. Jones,* 156 Ind. 682, it was held that demand before filing suit is not necessary. But in neither of them does it appear that the statute required that demand should be made. In the former opinion in this case it was held that the

prescribed requirements which are to be met by persons who may assert the lien must be strictly complied with, and the conditions which give rise to the lien must be clearly shown to exist, but that the remedial portions of the statute should be liberally construed. *The making of the demand required by Section 2867 lies between those conditions which must be met in order to give rise to the lien and the proceeding for its enforcement. But granting that it falls within the remedial aspects of the statute, the rule of liberal construction would not warrant the court in ignoring the requirement.* Though there is some force in the argument that a demand by a materialman upon the owner for money due from the contractor ought not to be required and that service upon the owner of a copy of the notice of the claim fully serves the purpose of appraising him of the nature of the claim and its amount, we believe that the reasoning in *Lewers & Cooke vs. Fernandez* to be sound. It is contended that a demand, though, required by statute to be made is a matter for the benefit only of the owner and may be waived by him, *and that demand was waived by the owners in this case by their failure to demur on the ground of the absence of an allegation of demand and the filing of an answer denying all liability.* A liberal construction of the statutory requirement would require a holding that demand may be waived by the owner, *but we are unable to sustain the contention that a failure to demur and the filing of an answer of general denial constituting a waiver. The making of a demand is a condition precedent to the commencement of the proceeding for the enforcement of the lien. It should be alleged in the plaintiff's complaint as having been made. The failure of the defendant to demur would not dispense with the necessity of proving the fact in order to enable the plaintiff to recover.* But the facts which may be claimed to constitute the waiver must have existed prior to the filing of the suit, and we hold that the course of pleading adopted by the owners in this case does not necessarily show that if de-

mand had been made upon them before the proceeding was taken into court they would not have made a settlement. Counsel are right in saying that the object of a demand is to enable a party to settle without suit, and it would seem to follow that the alleged waiver must have occurred before the commencement of the suit. A 'waiver' is the intentional relinquishment of a known right (40 Cyc. 252), *and there is nothing to show that either Rosenbledt or Harrison intended to relinquish the right to a demand before the action was instituted.* And our statute provides that under an answer denied generally the truth of the facts alleged in the plaintiff's complaint the defendant may give an evidence as a defense to the action 'any matter of law or fact whatever.' R. L. 1915, Section 2369. We hold therefore, that the non-suit was properly granted as to the parties against whose property the lien was sought to be enforced, and that the exceptions to this extent must be overruled."

If it was necessary to allege a demand upon Rosenbledt and Harrison in the foregoing case it was surely necessary to allege and prove it in the case at bar. It must be borne in mind that Chief Justice Robertson held that the defendants-in-error, Rosenbledt and Harrison, were owners within the meaning of the statute and being owners it is a condition precedent before a lienor could file suit against them that he allege and prove a demand upon them.

This point was disapproved by a new court in 24 Haw. at page 181, despite the ruling made in the case above by the former Chief Justice. Judge Quarles there says:

"It is urged on the part of defendants Rosenbledt and Harrison that as no demand was made upon

said defendants after the filing of the notice of lien and before the commencement of this action that their property cannot be bound for a lien claimed by plaintiff. We have held that the statute requires demand on the owner after the notice of lien is filed and prior to commencing action for its enforcement. (*Lewers & Cooke v. Fernandez,* 23 Haw. 744; *Lewers & Cooke v. Wong Wong,* 24 Haw. 39.) The evidence shows that demand was made by the plaintiff upon the corporation defendant but not upon the defendants Rosenbledt and Harrison after the notice of lien was filed and before this action was commenced. The defendants having engaged in a joint and mutual enterprise, their interests being correlated, we think that they should be regarded in the light of joint obligors, not so far as personal liability is concerned, but so far as their interest in the property involved is affected by plaintiff's lien. It has been held that one joint obligor is the agent for his co-obligors and may bind his co-obligors by a new promise on the joint obligation. *Macaulay vs. Schurmann,* 22 Haw. 140. By analogy the same rule should apply here owing to the mutuality of the interest in the building upon which the lien is claimed by plaintiff. But irrespective of that view the defendants Rosenbledt and Harrison are bound by the demand made upon the defendant corporation owing to the limited relation of principal and agency which existed between them as herein shown. In *Lewers & Cooke v. Wong Wong,* 22 Haw. 765, we held that the corporation defendant here was the agent of the defendants Rosenbledt and Harrison for the erection of the building for which the lien is here claimed. The relation of principal and agent, limited as it was, presents the question whether demand upon the corporation defendant was sufficient demand upon the other defendants. We think that it was and so hold."

In *Lewers & Cooke vs. Arthur H. Jones,* 25 Haw.,

page 214 (decided after Justice Quarles wrote the above opinion), the following appears relative to the demand in the statute:

"'If the demand for payment of the amounts due cannot be legally made until the lien has come into existence, it is clear that the demand made in this case was prematurely made and would not be in compliance with the statute.' In *Lewers & Cooke vs. Wong Wong,* 24 Haw. 39, 43, Chief Justice Robertson speaking for the court said: 'The making of the demand required by Section 2867 lies between those conditions which must be met in order to give rise to the lien and the proceedings for its enforcement.' In *Lewers & Cooke v. Fernandez,* 23 Haw. 744, 746, Mr. Justice Quarles, speaking for the court, said: 'After the notice of lien is filed and copy thereof served upon the owner demand upon the owner for the amount claimed under the lien is a condition precedent to bringing suit for its enforcement, and the fact of making such demand must be alleged and proven.' The plaintiff contends that the language just quoted from these decisions is mere dicta and in this contention it is probably correct, but the statements are so aptly worded and so clearly express the construction which we place upon our statute that we have no hesitancy in approving them as a correct statement of the law. We are unable to see how it can be held that a demand for payment of the amount due under a lien made before any obligation rests upon the owner upon whom the demand is made, that is, before the lien comes into existence, is a compliance with the statute."

Finally, we desire to call this Honorable Court's attention to the final holding or comment upon this point which is contained in 25 Haw. at page 350, as follows:

"The other members of the court, while agreeing with the conclusion that the former opinion of this court to the effect that a demand upon the Skating Rink, Ltd., constituted a demand upon Rosenbledt and Harrison is now the law of the case and not open to inquiry, *DESIRE TO EXPRESS THEIR DOUBT AS TO THE CORRECTNESS OF THAT HOLDING.* The writer does not desire to join in that expression but is content with the holding that we are bound by the former opinion."

We do not think it necessary to present any further argument under this point. The complaint in the case at bar having failed to allege a demand upon the owners between the time the lien was filed and prior to the time the within action was commenced, it fails to state facts sufficient to constitute a cause of action against the defendants-in-error and the judgment of the Supreme Court ought to be affirmed for this reason alone.

III.

THAT THE MOTION FOR A NON-SUIT MADE BY THE DEFENDANTS-IN-ERROR, ROSENBLEDT AND HARRISON, UPON THE GROUND THAT NO DEMAND HAD BEEN PROVEN AGAINST THEM, SHOULD HAVE BEEN GRANTED.

The argument advanced under point II clearly establishes this proposition.

IV.

THAT AT THE TIME THE PLAINTIFF-IN-

ERROR COMMENCED HIS ACTION THERE WAS NOTHING DUE UNDER HIS CONTRACT.

The contract in the case at bar among other things provides as follows relative to payments:

"Payments to be made as follows: At completion and acceptance of building a payment will be made to the amount of...$2,000.00
Thirty days (30) from the date of completion and acceptance 2,500.00
Forty-five (43) days from the date of completion and acceptance 1,963.60

"It being understood that the final payment shall be made within forty-five (43) days after this contract is completely finished, provided, that in each of the said cases the Architect *shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction;* provided further, that before such payment, if required, the contractor shall give the architect good and sufficient evidence that the premises are free from all liens and claims chargeable to the said contractor and further that *if at any time there shall be any lien or claim for which, if established, the owner of the said premises might be made liable, and which would be chargeable to the said contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify him against such claim or lien, until the same shall be effectually satisfied, discharged, or cancelled.* And should there prove to be any such claim after all payments are made, the contractor shall refund the owner of all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the former's default.

"14th: It is further mutually agreed between the parties hereto *that no certificate given* or payment made under this contract, *except the final certificate*

or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, against any claim of the owner, and no payment shall be considered to be an acceptance of any defective work."

Section 2868 of the Revised Laws of 1915 provides as follows:

"Whenever the work or material for which a lien is filed shall be furnished to any contractor for use as set forth in Section 2863, *the owner may retain from the amount payable to the contractor sufficient to cover the amount due or to become due to the person or persons who filed the lien.*"

It will be seen from the contract and the section above quoted, that if any liens were on file, the owners were entitled to withhold the amount of said liens from the payments which were due the plaintiff-in-error.

On December 11th, Lewers & Cooke filed a notice of lien for materials furnished the contractor in the sum of $2,586.61. (Record, Vol. II, p. 517). The complaint of the plaintiff-in-error was filed on December 16th and admits a payment of $2,470.00 on the date he filed his lien, to wit: December 11th. The architect's written acceptance of the building is in evidence and bears date November 4th, 1914. (See 25 Haw. 355.) It thus appears that at the time plaintiff-in-error filed his complaint, the last installment of the contract was not due, and his action was premature.

In *Kohler vs. Pennsylvania Railroad Company,* 19

Atl. 1048, the Supreme Court of Maryland uses the following language:

"While it is true the lien is created by statute, and that the remedy here pursued is also statutory, yet in the language of this court in the case of *McLaughlin vs. Reinhart,* 54 Maryland 76, the mechanic's lien law itself pre-supposes a contract, express or implied, which existing, the statute affixes a lien to secure the payment of the mechanic or materialman. But it is clear the right to compensation must exist, or there can be no lien. The right to compensation rests upon a contract either express or implied. * * *

"Inasmuch then as there can be no lien without a contract, the contract alleged must be proven."

Boisot on Mechanics' Liens, Section 579, contains the following:

"Any matter that would constitute a good defense to an action of assumpsit on the account which is the basis of the lien is a good defense to a suit to foreclose the lien, since, if nothing is due the plaintiff, he is, of course, not entitled to relief. *Thus, if the account is not due* when the suit was begun, there can be no recovery. And this defense may be set up by other defendants than the debtor."

It follows that the decision of the Supreme Court of the Territory ought to be affirmed for the reason that there was nothing due the plaintiff-in-error at the time he filed his complaint.

V.

THAT AT THE TIME THE PLAINTIFF-IN-ERROR MADE DEMAND UPON THE DEFEND-

ANT-IN-ERROR, HONOLULU SKATING RINK, LTD., THERE WAS NOTHING DUE WHICH THE PLAINTIFF-IN-ERROR WAS AUTHORIZED TO DEMAND PAYMENT OF.

The plaintiff-in-error made his demand upon the defendant-in-error, the Honolulu Skating Rink, Ltd., on the 15th day of December. On the 11th day of December, Lewers & Cooke, Ltd., filed a notice of lien for the sum of $2,586.61 which had not been "satisfied, discharged or cancelled." In the notice of lien filed by the plaintiff-in-error on December 11th, the plaintiff-in-error admits the payment of $2,470.00.

It readily follows that there was nothing due which the plaintiff-in-error was authorized to demand payment of on the 15th day of December.

It follows, therefore, that the judgment of the Supreme Court of the Territory ought to be affirmed for the reason that at the time the plaintiff-in-error made demand upon the defendant-in-error the amount claimed was not due and hence the statute was not complied with.

VI.

THAT IT AFFIRMATIVELY APPEARS THAT THIS COURT IS WITHOUT JURISDICTION OF THE SUBJECT MATTER OF THIS ACTION FOR THE REASON THAT THE SUM OF $5,000.00 EXCLUSIVE OF COSTS IS NOT INVOLVED.

In order to ascertain whether the court has jurisdiction of any action where the amount involved is

dependent thereon the complaint alone is the sole criterion.

11 Cyc. at page 782 contains the following:

"The declaration, complaint, or petition of the plaintiff should show that the amount in controversy is one over which the court has jurisdiction, and it is decided that in determining whether jurisdiction exists the court will ascertain the amount from the statements of plaintiff's cause of action and not by the *ad damnum* or amount for which judgment is prayed. But, although the complaint may state a cause of action for an amount in excess of the jurisdictional one, if the amount claimed is not in excess thereof the court will have jurisdiction, the claim in such case being considered as a remittance of the excess."

In an action to enforce a mechanic's lien the amount of the judgment depends upon the amount claimed in the Notice of Lien. A judgment cannot be rendered in an action to enforce a mechanic's lien for a sum in excess of the amount claimed in the Notice of Lien.

In *Henry Maurer, Respondent, vs. Charles H. Bliss,* 14 Daly's N. Y. 150, the following appears:

"As stated at the outset, this proceeding is brought to foreclose a mechanic's lien. The lien is acquired by filing the notice prescribed by Section 4 of the Mechanic's Lien Law (L. 1885e342), and dates from the filing of the notice. This must contain the nature and amount of * * * the material furnished, 'if the lien is for material.'

"Under a similar provision of the former law this court has held that such a notice cannot be amended (*Conklin vs. Wood,* 3 E. D. Smith 662); also *that the amount must be stated and judgment cannot be ren-*

dered for more than the amount claimed. (*Protection Union vs. Nixon,* 1 E. D. Smith 671; *Lutz vs. Ely,* 3 E. D. Smith 621.)

"The notice filed in this proceeding states the amount claimed to be $2,024.75; so did the bill of particulars, and the complaint also demanded judgment for that sum. Through some oversight or error in the calculation, the judgment rendered was for $2,248.25, or $223.50 more than the amount stated in the lien. Even if we have the power to amend the notice and the pleadings we have looked in vain for evidence to support this excess over the amount claimed in the lien.

"The judgment must, therefore, be reduced by $223.50, etc."

In the case at bar it affirmatively appears that on December 11th, the date that the plaintiff-in-error filed his notice of lien, only the first two installments of the contract price were due, to wit: Two Thousand Dollars ($2,000.00) on completion and acceptance of the building and Two Thousand Five Hundred Dollars ($2,500.00) in thirty (30) days from the date of completion and acceptance, making a total of Four Thousand Five Hundred Dollars ($4,500.00). The notice of lien admitting that the sum of Two Thousand Four Hundred and Seventy Dollars ($2,470.00) was paid at the time the notice was filed left only the sum of Two Thousand and Thirty Dollars ($2,-030.00) due at that date. The plaintiff-in-error would only be entitled to judgment for that sum in the event that he proved the allegation of his complaint and complied with the statute relative to the enforcement of the lien statement. In view of the above fact it follows that the sum of Five Thousand

Dollars ($5,000.00) exclusive of costs can not under any theory be considered involved in this case.

Could it be argued that, despite the fact that the money was not due at the time the notice of lien was filed, that the plaintiff-in-error could file his notice of lien for the full contract price?

Under our statute, before a notice of lien can be filed *the amount of lien must be due on the date of filing.*

Section 2864 of the Revised Laws of Hawaii, 1915, provides as follows:

"Filing Notice; Duration of Lien. The lien provided in Section 2863 shall not attach unless a notice thereof shall be filed in writing in the office of the clerk of the Circuit Court, where the property is situated, and a copy of the notice be served upon the owner of the property. *Such notice shall set forth the amount of the claim,* the labor or material furnished, a description of the property sufficient to identify the same, and any other matter necessary to a clear understanding of the same. The lien shall continue for forty-five days, and no longer, after the completion of the construction or repair of the building, structure, railroad or other undertaking against which it shall have been filed, unless the same shall have been satisfied, or proceedings commenced to collect the amount due thereon by enforceing the same. (L. 1888, c. 21, s. 2; C. L., s. 1742; R. L., s. 2174; am. L., 1919, c. 97, s. 1.)"

What is meant by the phrase, "Such notice shall set forth the amount of the claim"?

Anderson's Law Dictionary, at page 186, defining what constitutes a *claim,* contains the following:

"Every act upon *which any sum of money* or other

thing *is* or *is claimed to be due* to the person presenting it *is a claim or demand.*"

In *Douglas et al. vs. Beasley,* 40 Ala. 142, the following appears:

"What is the ordinary and legal definition of the word claim? Among the definitions given by Webster are, to ask or seek; to obtain by virtue of authority; right or supposed right; *to demand as due to be entitled to anything as a matter of right; a right to claim a demand; a title to any debt or privilege or other thing in possession of another.*"

In *Kelly and Wife vs. City of Madison,* 43 Wisconsin 638, the Supreme Court of Wisconsin has the following to say relative to the meaning of the word "claim":

"Section 24. No action shall be maintained by any person against the City of Madison upon any claim or demand until such person shall first have presented his claim or demand to the common council for allowance.

" 'Now the inquiry is, do these provisions relate to and fairly include a claim or demand arising out of a personal tort? We are clear of the opinion that they do not. It is true as was argued by the counsel for defendant the words "claim" and "demand" are words of very comprehensive meaning, broad enough perhaps to include an action for a personal tort.' C. J. Denio in *Howell vs. the City of Buffalo,* 15 N. Y. 512-523, when considering a kindred question says: 'Demands or claims are the largest words of that class and clearly embrace a cause of action founded upon a trespass to personal property.' Littleton says that the most beneficial release which a man can have is a release from all demands, and Lord Coke declares that a release of all claims extends to all demands."

7 Cyc., p. 180, contains the following definition of the word "claim":

"As a noun a word of very extensive signification, embraces every species of legal demand. The largest word of law and includes 'demand' and 'debt'."

In *Gray vs. Palmer,* 9 Cal. 616, 636, the following appears relative to the word "claim":

"It is certainly a very broad term, when used with certain connections, and in reference to certain matters. Lord Coke truly says, that the word demand is the largest word known to the law, save only claim; and a release of all demands discharges all rights of action."

It thus appears from the authority above that in order to constitute a claim there must be something due to the claimant. It would seem to follow that under the statute before a notice of lien can be filed by the contractor the amount of the lien must be due at the date of filing the same.

In *Schroth et al. vs. Black,* 1 Ill. Apps. 168, the following appears:

"We agree with the appellee that Section 4 contemplates that the money shall be due when the statement is filed, for the last clause of it provides that the claimant 'may bring suit at once' and there is no hint in the whole chapter that he may sue before his money is due, although in such case he may under Section 16 intervene in a suit commenced by any other party."

The language of Section 2864 of the Revised Laws of Hawaii, 1915, "unless the same shall have been

satisfied or proceedings commence to collect the *amount due thereon by enforcing the same,*" by inference leads to the construction that the amount of the lien *must be due at the time of filing the same.* As was said by the appellate court of Illinois, "there is no hint in the whole chapter that he may sue before his money is due."

In *Lucas vs. Hustace,* 20 Haw. at page 698, the Supreme Court of the Territory of Hawaii uses the following language:

"To avoid duplicating payments *the owner may protect himself* by requiring a bond from the original contractor, by dealing solely with those who are financially responsible, by withholding payment of the amount due to the contractor *until after the expiration of the period within which notices of liens may be filed,* or by other means."

We do not deem it necessary to argue this point any further. The last installment of the contract not being due at the time of plaintiff-in-error filed his notice of lien, and the plaintiff-in-error admitting that there was a payment of Two Thousand Four Hundred and Seventy Dollars ($2,470.00) made to him prior to that day, this court is without jurisdiction in this action for the reason that the sum of Five Thousand Dollass ($5,000.00) exclusive of costs is not involved.

REPLY TO PLAINTIFF-IN-ERROR'S BRIEF.

The plaintiff-in-error's brief does not in our opinion set forth any reason for reversing the decision of the Supreme Court of the Territory. The

first point advanced is as follows:

"The default of the Honolulu Skating Rink, Ltd., was an admission by the principal defendant of all the allegations in the complaint upon which the finding of the court was final, as the Supreme Court could not review questions involving weight of evidence."

This point does not appear definite enough for us to understand just what counsel is contending for. The mere fact that the Honolulu Skating Rink, Ltd., defaulted, has no effect whatsoever upon the defendants-in-error, Rosenbledt and Harrison. It must be borne in mind that in an action similar to the one in the case at bar, a personal judgment could be entered against the contractor (the Honolulu Skating Rink, Ltd.), while under no circumstances could such a judgment be rendered against the defendants-in-error, Rosenbledt and Harrison. The defendants-in-error, Rosenbledt and Harrison, filed their answer of general denial and as a separate defense set up fraud, illegality and payment in accordance with the rule of the Circuit Court. The burden of proof was upon the plaintiff-in-error to establish all the allegations in his complaint as against the defendants-in-error.

The case of *Hopper vs. G. W. Lincoln et al.,* 12 Haw. 352, throws much light upon determining the proceedings to enforce a lien in the Territory. The court said:

"The statute contemplates an enforcement of the lien by an action at law. If the action were by a

principal contractor against the owner, there could be no difficulty, for 'the ordinary allegations in assumpsit' could be made and a judgment be obtained against the owner personally on the contract. But when, as here, the action is by a subcontractor, the ordinary allegations in assumpsit can ordinarily be made against the principal contractor only and a personal judgment be obtained against him alone. And yet we see no reason why the owner may not be made a party and a judgment be entered against him for the enforcement of the lien. Certainly he is a necessary party where his interests are to be affected. While the proceeding is to a certain extent of the nature of a proceeding *in rem,* it is not so in all respects. It is not a proceeding leading to a judgment against the property which will bind all the world. Persons not parties are not bound. *The owner is a necessary party defendant even though no judgment can be entered against him personally.* * * * *In such cases the judgment, in conformity with the allegations, is against the principal contractor personally on the contract and against the owner for the enforcement of the lien against his interest in the property in question."

The next point is as follows:

"That the amount of the final payment was shown to have been due by the decision of the question on the same facts in their former appeal and had so become the law of the case."

This is the first time this case has come before this Honorable Court, which is the court of last resort. It is our opinion that for any matter to become the law of the case, this court must have passed upon it prior to this time.

In the case of *Klauber v. Car Co.*, 98 Cal. 105, 107, the following appears:

"The 'law of the case' is a phrase which has been formulated in this state to give expression to the rule that the *final judgment of the highest court upon a question of law arising between the parties to that controversy, and is a final determination thereof, and like a final judgment in any other case, estops the parties thereto from afterwards questioning its correctness.*"

It is obvious from the above that the doctrine "of the law of the case" has no application to the case at bar.

The third point advanced is as follows:

"Even if the Supreme Court was right in deciding that final payment was not due because forty-three days had not run, the claim for extras and the first and second installments were due and the lien for $2,580.00 should have been declared, as the defendants are not entitled to a credit of the $545.00 paid after the entire amount became due."

The learned counsel for the plaintiff-in-error seems to have overlooked the fact that at the date the plaintiff-in-error filed his complaint, Lewers & Cooke, Ltd., had filed a lien for the sum of $2,586.61.

The remaining point, to wit:

"That the plaintiff was deprived of his right to introduce further evidence that the building was accepted on November 2nd, 1914, when the Circuit Court entered judgment on motion without any order therefor from the Supreme Court,"

is without merit.

At the time the case was sent to the lower court the plaintiff-in-error made no motion to reopen his case upon the ground of newly-discovered evidence. The certificate of the architect was introduced by the plaintiff-in-error himself. We are at a loss to see how the plaintiff-in-error could vary the same.

We respectfully urge that the judgment of the Supreme Court of the Territory be affirmed.

Respectfully submitted,

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